No. 10-402

IN THE
Supreme Court of the United States

TUCK-IT-AWAY, INC., et al.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR PETITIONERS

I. The Applicability of *Kelo*

Respondent does not dispute that this is the classic case of preselection of the developer – Columbia University. Instead, Respondent argues that "Petitioners' submission ... is no more than a challenge to [the Court of Appeals'] factbound determination and thus, does not warrant review by this Court."[1] This assertion is wrong.

Respondent misses the essence of Petitioners' challenge, and the importance of this case. In his concurrence in *Kelo v. New London*, Justice Kennedy warned of "categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose. . . " 545 U.S. 469, 493 (2005). Thus, deferential review of an administrative decision might not be warranted in certain circumstances, when "the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." *Id.* As the New York Appellate Division correctly recognized, the preselection of Columbia University presents exactly these circumstances.

Remarkably, Respondent claims that the issue presented in this Petition, to wit, "whether *Kelo* controls

1. Respondent's Brief in Opposition ("Respondent's Brief") at 3.

whenever courts are confronted with evidence of impermissible governmental favoritism and pretext in an eminent domain proceeding," is not raised in this case because the Court of Appeals "examined Petitioners' claims of bad faith and pretext and rejected them on the merits, holding that Petitioners' pretext claim was 'unsubstantiated by the record'".[2] But the Court of Appeals' decision never cites *Kelo*, nor does it examine the factors that Justice Kennedy identified,[3] which the New York Appellate Division employed to analyze the evidence of pretext and favoritism here. Instead, when faced with the very factors that Justice Kennedy warned of, the Court of Appeals deliberately did not consider *Kelo*, instead deferring to a governmental administrative agency whose arguments the Court of Appeals relied upon wholesale.

The question of law that lies at the heart of this Petition is whether, under *Kelo*, the deferential standard the Court of Appeals used to evaluate the evidence of pretext here is the correct legal standard. Contrary to Respondent's unfounded argument that this Petition presents only a factbound determination, whether a taking serves a public purpose or is instead pretext, and concomitantly, the relevant standard of review to assess such a claim, is indisputably a question of law. *See City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930). This Court's answer will dispel the confusion among courts nationwide, and clarify for property owners a question of constitutional dimension. Accordingly,

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2. Respondent's Brief at 18.

3. Petitioners' Petition for a Writ of Certiorari ("Petition") at 22-24.

Petitioners ask this Court to grant *certiorari* and set forth the applicable legal standard in these eminent domain cases, and to hold that the Court of Appeals erred in not applying that legal standard in the face of clear allegations of pretext and favoritism.

A. This Court Should Address the Serious Conflict that Exists Among Lower Courts

Although Respondent acknowledges the existence of a conflict, it attempts to distract this Court by arguing that the conflict is "limited in nature" and would benefit from "further 'percolation.'"[4] This argument is disingenuous at best. Respondent does not, nor could it, explain the inherent contradiction between the Second Circuit's decision in *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), which suggested that the "searching review" contemplated by Justice Kennedy should be limited only to takings for economic development,[5] and other courts that have expressly adopted *Kelo*'s analysis for takings that allege classic public purposes.[6] Neither does Respondent try to square the Court of Appeals' refusal to discuss *Kelo* with the approaches of the other courts below.

Instead, Respondent confuses the issue by insisting that the Court of Appeals made a purely factbound determination. This is a dangerously flawed argument. Significantly, the central issue before this Court is the

4. Respondent's Brief at 28.

5. Petition at 27-28.

6. Petition at 28-31.

appropriate *level* of review when assessing if a taking for a private beneficiary is pretextual – whether "searching" or a "skeptical eye," as opposed to merely deferential – but Respondent evades that question by insisting, without support, that the Court of Appeals had examined the pretext claim here. The Appellate Division plurality noted that any discussion of the constitutionality of the ESDC's "scheme" must begin with analysis under *Kelo* and under the heading "THE KELO DOCTRINE MANDATES" outlined how the ESDC actions fell short of such mandates.[7] The Court of Appeals ignored this issue entirely, and its cursory review of the record indicates that it had decided, erroneously, that *Kelo* did not apply.[8] The difference between these decisions is not factual evaluation, but a disagreement on which legal standard to apply.

Respondent's argument that this Court's review would be immaterial thus rings hollow. Should this Court find that *Kelo* applied to this case, and that such one-to-one transfers of property warranted greater than deferential review, the Court of Appeals here would have committed reversible error. In fact, any examination of Petitioners' pretext claim by the Court of Appeals was conclusory and superficial. For example, Respondent emphasizes the only two paragraphs in the Court of Appeals opinion that remotely address pretext. Instead of a searching review on the merits, the Court of Appeals summarily dismissed Petitioners' evidence of pretext and bad faith, and accepted Respondent's assertions at face value, which it then parroted in its opinion.

7. *See* Petition at 48a.

8. *See also* Petition at 16 n.20.

Neither does Respondent attempt to square the Court of Appeals' refusal to discuss *Kelo* in its opinion with the other cases below. Contrast the treatment of the pretext evidence here with that of *Franco v. Nat'l Capital Revitalization Corp.*, which noted that under *Kelo*, "there may be situations where a court should not take at face value what the legislature has said." 930 A.2d 160, 169 (D.C. App. 2008). And while *Franco* did suggest that prior identification of the private beneficiaries would not categorically condemn a taking, that factor is but one facet in this case that, taken together, demonstrate the pretext here.[9] Indeed, *Franco* indicated that the factors identified by Justice Kennedy "may accurately predict what the Court will hold when the record before it does not resolve the pretext issue." *Id.* at 169 n. 9. Similarly, Respondent does not dispute the Hawaii Supreme Court's holding that courts are "obligated to consider any and all evidence . . . indicating that the private benefit . . . predominated." *County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615, 650 (Haw. 2008).[10] This requirement clashes with the

9. Petition at 22-24.

10. The subsequent history of *County of Hawai'i* does not disturb this conclusion. *See County of Hawai'i v. C&J Coupe Family*, No. 29887, 2010 Haw. App. LEXIS 661 (Haw. Nov. 10, 2010). The Hawai'i Supreme Court affirmed the lower court's conclusion on remand that there was no pretext, because among other things, there had been a legislative resolution for the condemnation, and testimony from the Director of Public Works established prior longstanding general plans consistent with the condemnation. *See id.* at *40-41, *55-56. In doing so, the Hawai'i Supreme Court reiterated its original holding, premised on *Kelo*, that "a court may 'look behind an eminent domain plaintiff's asserted public purpose' to determine

(Cont'd)

Court of Appeals' casual dismissal, without any substantive discussion, of Petitioners' pretext argument.

Respondent also attempts to distinguish *Middletown Twp. v. Lands of Stone*, 595 Pa. 607 (Penn. 2007), but the Pennsylvania Supreme Court has recently extended its holding beyond purely pretextual purposes, where the condemnation, in Respondent's words, "was not intended to accomplish its stated objective."[11] After this Petition was filed, the Pennsylvania Supreme Court held in *In re Opening a Private Rd. ex rel. O'Reilly*, 5 A.3d 246, 2010 Pa. LEXIS 2272 (Penn. Sept. 30, 2010), that a condemnation for the construction of a private road to connect landlocked property to a public road effected a taking. Relying on both *Kelo* and *Lands of Stone*, the Pennsylvania Supreme Court remanded for further proceedings, because the lower court's reasoning that the construction of a private road furthered the public purpose of making landlocked tracts of property accessible, "speaks merely to the presence of some public benefit," and had made "no attempt to confirm that the public is the primary and paramount beneficiary." *Id.* at *31-32. In so holding, the Pennsylvania Supreme Court explicitly rejected the dissenting justices' position, because they had failed to

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(Cont'd)

whether a purpose is pretextual." *Id.* at *31 (quoting *County of Hawai'i*, 198 P.3d at 647). This latest iteration of *County of Hawai'i* indicates what factors will defeat an allegation of pretext, factors which do not exist in this case.

11. Respondent's Brief at 31.

consider "the internal limitations of the *Kelo* decision" on the use of eminent domain. *Id.* at *34.

Respondent's attempt to minimize the actual conflict among these cases is unavailing. The confusion below on how claims of pretextual takings should be evaluated deserves this Court's attention, and this case is an appropriate vehicle to explore the contours of the "internal limitations of the *Kelo* decision." *Id.*

B. By Applying the Incorrect Standard of Review, The Court of Appeals Obscured Substantial Evidence of Pretext and Favoritism

Respondent is similarly mistaken when it claims that the Court of Appeals decision is consistent with Kelo.[12] By ignoring *Kelo*, the Court of Appeals refused to acknowledge the overwhelming record evidence of favoritism and pretext, the same facts that prompted the Appellate Division to undertake the searching review called for in *Kelo*. The difference between the treatment of the facts by the Court of Appeals and the Appellate Division is night and day, and highlights the importance of the need for this Court's review. Respondent's misrepresentation of the critical facts that demonstrate significant favoritism and pretext in its Brief in Opposition, only underlines the need for this Court to articulate the appropriate standard of review for such claims.

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12. Respondent's Brief at 22.

To say that the Court of Appeals determined the case on the merits begs the question presented by this case. The finding that there was blight, or that because the project benefited Columbia, an educational institution, it met the standard for a civic purpose, or that other alternatives were considered are findings that clearly will vary depending on the standard of review to be applied.

Thus when the Court of Appeals found that the ESDC finding that the area was blighted was justified it clearly accepted the "expert" reports relied on by the agency. Yet significant questions were raised below that their conclusions lacked basis and that they were seriously flawed in their analysis.[13] Other questions were raised as to whether prior to consideration of the Columbia plan, the area had been previously found to be blighted.[14]

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13. *See Kaur v. NYS Urban Development Corporation*, Petition at 60a-63a. The plurality of the Appellate Division found the studies so biased that it concluded "the blight designation in the present case is mere sophistry." *Id.* at 48a.

14. *See Kaur v. NYS Urban Development Corporation*, Petition at 58a. Respondent persisted in trying to introduce with its pleadings an excerpt from a 1957 study, but the plurality of the Appellate Division refused to consider this document, as it is extraneous to the record, *id*. at 58a-59a, and the "residential" areas it described as blighted do not identify the Manhattanville industrial district. The Court of Appeals, by contrast, cited a 2004 draft study that was abandoned, lacked any factual basis for its assessment of building conditions, misapplied blight criteria, and was explicitly rejected by ESDC as inadequate to provide for a basis for a finding of blight. See December 15, 2004 e-mail of Maria Cassidy, RA-537.

Certainly, there are sufficient questions raised in the record below as to whether the finding of blight was merely a means to justify a pre-ordained result – the adoption of the Columbia plan – or a true finding of "a substandard and unsanitary area" to warrant more than mere deference to the ESDC. A more searching or heightened inquiry was warranted. The Appellate Division plurality applied such a standard relying on *Kelo*; the Court of Appeals, ignoring *Kelo*, did not.

So too with regard to the issue of educational purpose and civic project the same rationale applies. The record below shows that such a designation was an after thought and not the dominant purpose for the adoption of the Columbia plan. While the Appellate Division plurality found no basis for a civic project, the Court of Appeals, ignoring *Kelo* found that the mere invocation of an educational purpose was enough to grant Columbia eminent domain. The distinction here is further highlighted by the recent case *In re Opening a Private Rd. ex rel. O'Reilly*, decided by the Pennsylvania Supreme Court. Relying on *Kelo*, the Pennsylvania Supreme Court rejected a finding of public purpose without a confirmation that the public is "the primary and paramount beneficiary."

The Columbia plan could not withstand such scrutiny. Merely citing Columbia's self defined need for 17 acres to expand its campus does not equate with a public purpose. Under *Kelo* a more searching inquiry is required and this the Court of Appeals did not do.

Finally it should be noted that in a transparent effort to avoid *Kelo* both the Court of Appeals and Respondent

in its brief contend that the ESDC considered other alternative plans for the property. Citing to an Environmental Impact Statement prepared several years after the project was designed to the specification of a sole developer, Columbia, could not withstand the rigors of *Kelo*.[15] No application of the procedural safeguards contemplated in *Kelo* would accept such clear favoritism. As the Appellate Division plurality found and the record below documents, Columbia was the pre-selected developer.

In sum, Respondent's arguments that this case does not warrant review is not persuasive. We submit that the record below, the decision of the lower court and the utter refusal of the Court of Appeals to consider *Kelo* as controlling, together with the conceded confusion among the courts as to the scope and import of *Kelo* make this case eminently appropriate for granting certiorari.

II. Petitioners' Due Process Claim

Finally, Respondents argue that "review is unwarranted in light of the Court of Appeals' determination that the internal ESDC documents at issue in Petitioners' FOIL proceeding were not material and that Petitioners were not prejudiced by not obtaining them."[16] Footnote 69 of Repondent's Brief

15. Petition at 8a; Respondent's Brief at 8. Respondent's consideration of "alternatives" bears no resemblance to the kind of consideration of alternative plans and beneficiaries that Justice Kennedy approved in *Kelo*.

16. Respondent's brief at 36.

makes clear that the above statement only refers to one FOIL proceeding which the Court of Appeals heard (*West Harlem Business Group v. Empire State Dev. Corp.*, 13 N.Y. 3d 882 (2009)) and involved only seven documents.[17] There are numerous FOIL proceedings, however,[18] and even today, two years later, a FOIL proceeding that involves some 252 records remains pending in New York State Supreme Court. It would be impossible for Petitioners to demonstrate materiality and/or prejudice to records that they do not have access to. Under such circumstances, it is the quintessential Catch-22 to demand that Petitioners demonstrate prejudice.[19]

Respondent also greatly minimizes the importance of the due process claim made here. Because procedural protections within the context of eminent domain vary across the country, this case provides a platform for this Court to establish the minimum due process rights that a property owner is entitled to in eminent domain proceedings, in both New York and the rest of the nation.

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17. *Id.*

18. *See* Petition, Footnote 25, page 36.

19. Courts have recognized this Catch-22 in a similar situation, holding that a party need not demonstrate that destroyed or withheld evidence is sufficiently "relevant" to its claim or defense in order to obtain an adverse jury instruction. *See Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 109 (2d Cir. 2002) ("Courts must take care not to hold [ ]the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence because doing so would subvert the … purpose of the adverse inference, and would allow parties who have…destroyed evidence to profit from that destruction") [citations omitted].

CONCLUSION

This case raises substantial questions of national importance concerning fundamental constitutional rights that need guidance from this Court. We respectfully urge this Court to grant review of this matter.

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November 22, 2010

Respectfully submitted,

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